

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 14, 2000 Session

**CONSUMER ADVOCATE DIVISION, ON BEHALF OF TENNESSEE
CONSUMERS v. TENNESSEE REGULATORY AUTHORITY AND
BELLSOUTH TELECOMMUNICATIONS, INC.**

**An Appeal from the Tennessee Regulatory Authority
No. 99-00391 Sara Kyle, Director**

No. M1999-01170-COA-R12-CV - Filed May 30, 2001

This is an appeal from an order by the Tennessee Regulatory Authority. The Tennessee Regulatory Authority denied the Consumer Advocate Division's request for a declaratory order as to the applicability of Tennessee Code Annotated §§ 65-5-208(a) and 65-5-209 to a telephone company's proposed tariff. It also denied the Consumer Advocate Division's request for a declaratory order as to the applicability of a previous order by the Authority approving the telephone company's application for price regulation, dismissed its claim for breach of contract, and denied its request for injunctive relief. Consequently, the proposed tariff was approved. The Consumer Advocate Division appeals. We affirm.

**Tenn. R. App. P. 12 Petition for Review from the Tennessee Regulatory Authority;
Judgment of the Tennessee Regulatory Authority is Affirmed.**

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S. and ALAN E. HIGHERS, J., joined.

Paul G. Summers, Attorney General & Reporter; Michael Moore, Solicitor General; and L. Vincent Williams, Assistant Attorney General, for the appellant, Consumer Advocate Division.

J. Richard Collier and Julie Woodruff, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

Guy M. Hicks and Patrick W. Turner, Nashville, Tennessee, for the appellee, BellSouth Telecommunications, Inc.

OPINION

This case is an appeal of an order by the Tennessee Regulatory Authority. The appellant, the Consumer Advocate Division (the "Consumer Advocate"), is a division of the Office of the Attorney

General & Reporter which represents the interests of Tennessee consumers of public utilities. *See* Tenn. Code Ann. §§ 65-4-118(c), 65-5-210(b) (Supp. 2000). The appellee Tennessee Regulatory Authority (“Authority”) is vested with “general supervisory and regulatory power, jurisdiction, and control over all public utilities.” Tenn. Code Ann. § 65-4-104. The predecessor to the Authority was the Tennessee Public Service Commission (“Commission”). BellSouth Telecommunications, Inc. (“BellSouth”) is a public utility providing telecommunication services in Tennessee.

In October 1994, BellSouth filed with the Commission a proposed tariff. BellSouth sought to amend its existing tariff to include a charge for directory assistance. The Consumer Advocate filed a petition to intervene, in opposition to the tariff. The Consumer Advocate’s petition to intervene was granted by the Commission. On January 5, 1995, the Commission approved BellSouth’s proposed tariff, on the condition that BellSouth file an amended tariff meeting certain conditions by February 1, 1995. BellSouth failed to file the amended tariff by the required date. Consequently, the Commission voted to reconsider the January order conditionally approving the tariff.

Before the Commission reconsidered BellSouth’s proposed tariff, BellSouth and the Consumer Advocate entered into a settlement agreement altering the proposed directory assistance charge so that the net effect of the charges would be as close to zero as possible. The proposed settlement agreement stated that the agreement would be presented and recommended to the Commission, and recognized that the Commission had “the authority to approve or disprove tariffs, rates, and related issues.” On February 3, 1995, BellSouth and the Consumer Advocate submitted to the Commission the settlement agreement and the revised tariff. They asked that the agreement be placed on the agenda for the Commission’s next conference. The Commission, however, took no further action on the proposed agreement and revised tariff.

In June 1995, the Tennessee Legislature enacted new legislation, The 1995 Tennessee Telecommunications Act, which substantially altered the manner in which public utilities in Tennessee are regulated. *See* 1995 Tenn. Pub. Acts, ch. 408; Tenn. Code Ann. § 65-5-201 *et seq.* The Act created a new procedure by which companies such as BellSouth could elect price regulation. It also terminated the Commission effective June 30, 1996 and created the Authority effective July 1, 1996. *See* 1995 Tenn. Pub. Acts, ch. 305. As a result, on June 28, 1996, the Commission entered a general order terminating all pending business effective June 30, 1996. This included BellSouth’s proposed settlement agreement and revised tariff.

On July 18, 1996, the new Authority entered an administrative order accepting recommencement of cases pending at the sunset of the Commission. However, the Consumer Advocate did not recommence BellSouth’s case. In August 1996, the Authority sent a letter to BellSouth informing BellSouth that its 1994 filing seeking approval of the directory assistance tariff was closed and “**will not** become effective.” (emphasis in original).

Citing changes in the regulatory landscape, BellSouth sent a letter dated May 30, 1996 to the Consumer Advocate, informing the Consumer Advocate that its October 1994 tariff had been

withdrawn.¹ The letter asserted that changes in the regulatory environment and the withdrawal of the tariff now made the settlement agreement between the parties “moot.” The letter stated that BellSouth had no immediate plans to make a similar filing, and that before it made such a filing, it would contact the Consumer Advocate “to discuss [the] matter in a manner consistent with the negotiation procedure which produced the draft settlement agreement.”

Meanwhile, in June 1995, BellSouth filed an application with the Commission for price regulation. Its application for price regulation was finally approved in December 1998². Subsequently, on June 1, 1999, BellSouth filed a proposed tariff to begin charging \$0.29 for each directory assistance call. On June 15, 1999, the Consumer Advocate filed a petition with the Authority seeking declaratory orders and injunctive relief. In the petition the Consumer Advocate sought a declaratory order as to the applicability of Tennessee Code Annotated sections 65-5-208(a)³ and 65-5-209⁴ to BellSouth’s proposed tariff, as well as a declaratory order as to whether the

¹As the Authority points out in its brief, it is unclear whether BellSouth notified the Commission of the withdrawal of the tariff. There is nothing in the record confirming the withdrawal of the tariff, and, in its complaint the Consumer Advocate alleges “[t]hat no hearing or motion withdrawing the tariff was ever held.”

²The Commission had tentatively approved BellSouth’s application to elect price regulation in January 1996 with the condition that BellSouth reduce its rates by fifty-six million. BellSouth appealed. In *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997) (*perm. to appeal denied* June 15, 1998), the Court of Appeals reversed the Commission and remanded the cause for approval of the application. *Id.* at 682. On remand the Authority approved the price regulation plan. The Authority’s order was subsequently affirmed on appeal. *See Consumer Advocate Div. v. Tennessee Regulatory Auth.*, No. M199902151COAR12CV, 2000 WL 13794 (Tenn. Ct. App. Jan. 10, 2000), *reh’g denied* Feb. 11, 2000.

³Section 65-5-208(a) provides:

(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:

(1) “Basic local exchange telephone services” are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.

(2) “Non-basic services” are telecommunications services which are not defined as basic local exchange telephone services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

⁴Section 65-5-209 states in pertinent part:

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone

(continued ...)

Authority's order approving BellSouth's application for price regulation was applicable to the 1995 settlement agreement between the Consumer Advocate and BellSouth. The Consumer Advocate alleged that, under sections 65-5-208(a) and 65-5-209, directory assistance is a basic service for price regulation purposes, and, therefore, under the statutes, BellSouth was precluded from increasing its price for a period of four years after BellSouth became subject to price regulation. The petition also alleged that BellSouth breached a contract with the Consumer Advocate by failing to contact the Consumer Advocate before BellSouth filed the 1999 proposed tariff, pursuant to the 1995 settlement agreement. The complaint requested that the charge for directory assistance be enjoined until resolution of the Consumer Advocate's breach of contract claim.

After receiving the Consumer Advocate's petition, the Authority suspended BellSouth's tariff for thirty days. The Authority then considered the Consumer Advocate's petition at its regularly scheduled July 27, 1999 conference. After hearing oral arguments, the Authority deferred action on the tariff, expressing concern about charging elderly persons for directory assistance. Subsequently, BellSouth filed an amended proposed tariff. Thereafter, on July 29, 1999, the Authority dismissed the Consumer Advocate's petition and complaint, *sua sponte*, and approved BellSouth's amended tariff.

In its July 29 order, the Authority found that there was no basis for granting the declaratory relief sought by the Consumer Advocate. The Authority concluded that "the classification of BellSouth's tariff to implement a charge for directory assistance as a 'non-basic' service [was] consistent with [section] 65-5-208(a)(1)" as determined in the Authority's prior decision in ***United Telephone-Southeast, Inc. Tariff No. 96-201, To Reflect Annual Price Cap Adjustment***, Docket No. 96-01423 (Sept. 4, 1997).⁵ In this prior decision, the Authority concluded that directory assistance was a non-basic service under section 65-5-208(a). In the July 29 order, the Authority also declined to convene a contested case, asserting that the Consumer Advocate had already litigated the same issues in two cases previously decided by the Authority, and which were pending at that

⁴(...continued)

company becomes subject to such regulation. . . .

(h) Incumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g), the non-discrimination provisions of this title, any rules or orders issued by the authority pursuant to § 65-5-208(c) and upon prior notice to affected customers. . . .

⁵This case arose out of a tariff filed by United Telephone-Southeast, Inc. seeking to increase in rates for non-basic services. At issue was the methodology used by United Telephone-Southeast to determine the amount of the proposed increase. The Authority found that the method used by United Telephone-Southeast complied with the section 65-5-209(e) and approved the tariff. The Consumer Advocate appealed, and in ***Consumer Advocate Division v. Tennessee Regulatory Authority***, No. M1999-01699-COA-R12-CV, 2000 WL 1514324 (Tenn. Ct. App. Oct. 12, 2000) (hereinafter ***United Telephone***), this Court affirmed.

time before the Court of Appeals.⁶ The Authority found that the proposed settlement agreement was not binding on either the Consumer Advocate or BellSouth because it was never approved by the Commission, it pre-dated the 1995 Tennessee Telecommunications Act, and because the Consumer Advocate did not recommence the action regarding the proposed agreement after the Commission ceased to exist. The Authority concluded, therefore, that there was no basis for issuing a declaratory order as to the applicability of the proposed agreement to the tariff. From this order, the Consumer Advocate now appeals.

Our review of this case is governed by Tennessee Code Annotated section 4-5-322(h), which sets forth the standard of review for the decision of an agency such as the Tennessee Regulatory Authority:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h)(1998).

On appeal, the Consumer Advocate argues that the Authority did not properly interpret Tennessee Code Annotated sections 65-5-208(a) and 65-5-209 as they relate to charges for directory assistance under an incumbent local exchange telephone company price regulation plan. The Consumer Advocate contends that, under the statutes, BellSouth was precluded from increasing its

⁶ In both cases the Authority's decision was affirmed. *See Consumer Advocate Div.*, 2000 WL 13794 at *3; *United Telephone*, 2000 WL 1514324 at * 5 & n. 3.

rate for directory assistance for four years after the company became subject to price regulation,⁷ because directory assistance is a basic service as defined in section 65-5-208(a), and the ordinary and natural meaning of the terms “usage,” “provision,” and “recurring and nonrecurring charges” include directory assistance.

In the order which is the subject of this appeal, the Authority did not reach the merits of the issues raised by the Consumer Advocate. Instead, the Authority denied the Consumer Advocate’s petition seeking declaratory relief and declined to convene a contested case because it determined that the issues raised by the Consumer Advocate had been determined in previous cases. The order also dismissed the Consumer Advocate’s complaint, *sua sponte*, for failure to state a claim. The Consumer Advocate does not argue, under Tennessee Code Annotated § 4-5-322(h) that the Authority’s decision was in violation of constitutional or statutory provisions, in excess of its statutory authority, made by unlawful procedure, or that it is unsupported by substantial material evidence. Therefore we surmise that, by our statutory standard of review, the issue on appeal is whether the Authority’s decision to decline to grant declaratory relief, decline to convene a contested case, and to dismiss the complaint for failure to state a claim was an abuse of the Authority’s discretion.

The Consumer Advocate argues first that the Authority’s order should be reversed because the Agency failed to provide a sufficient statement of the underlying facts to support its findings, as required by Tennessee Code Annotated § 4-5-314(c). The Consumer Advocate argues that the Authority failed to detail facts regarding why directory assistance is not a basic service as defined in section 65-5-208(a); what the terms usage, provision, or charges mean as they relate to local basic exchange service; whether the United Telephone-Southeast tariff in the Authority’s prior decision was sufficiently similar to the BellSouth tariff so that the Authority’s decision in that matter would be applicable in this case; the relevant issues and part of the decision in the two cases named by the Authority in its order related to this case; and why the 1995 agreement was not binding.

An agency, when issuing a final order, must provide a concise and explicit statement of the underlying facts supporting the agency’s findings. Tenn. Code Ann. § 4-5-314(c). Findings of fact made by the agency should be based exclusively on the evidence of the record and on matters noted in the proceeding. Tenn. Code Ann. § 4-5-314(d). Exactness in form and procedure is not required; rather, the findings based on the evidence need only be specific and definite enough so that a reviewing court may determine the pertinent questions of law and whether the agency’s general findings should stand, particularly when the findings are material facts at issue. *See Levy v. State of Tennessee Bd. Of Exam’rs for Speech Pathology and Audiology*, 553 S.W.2d 909, 911-12

⁷Section 65-5-209(f) precludes increasing rates on a basic service for four years after a local exchange telephone company becomes subject to price regulation:

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation. . . .

(Tenn. 1977) (quoting *State Bd. of Med. Exam'rs v. Grandy*, 149 S.E.2d 644, 646 (S.C. 1966)). “The sufficiency of an agency’s findings of fact must be measured against the nature of the controversy and the intensity of the factual dispute.” *CF Industries v. Tennessee Pub. Serv. Comm’n*, 599 S.W.2d 536, 541 (Tenn. 1980).

Therefore, in order to comply with the requirements of section 4-5-314, an agency need only set forth facts sufficient to support its legal conclusions and to afford the Court an effective review of its findings. In denying the Consumer Advocate’s petition, the Authority asserted that there was no basis for issuing the requested declaratory order as to the applicability of sections 65-5-208 and 65-5-209 or for convening a contested case because the issues raised by the Consumer Advocate had been addressed by the Authority in prior decisions. The Authority stated that it had previously ruled in *United Telephone-Southeast* that directory assistance was classified as a non-basic service, rejecting the same argument the Consumer Advocate now advances in this proceeding, namely, that directory assistance is a basic service under the statutory term “usage.” The Authority then dismissed the Consumer Advocate’s claim for breach of contract, finding that it failed to state a claim, based on the following facts: that the proposed agreement had required, but never received, approval of the Commission; the Consumer Advocate’s failure to preserve the docket which included the agreement; and the fact that the 1995 Tennessee Telecommunications Act expressly established what constituted basic and non-basic services and superseded any pre-existing agreement or tariff which classified services to the contrary. The Authority noted that since the agreement was not binding, it had no effect on BellSouth’s proposed tariff. Under these circumstances, the Authority’s decision was supported by a sufficient statement of the underlying facts that served as the basis for its decision.

We next address whether the Authority abused its discretion by refusing to issue the requested declaratory relief and by refusing to convene a contested case. The decision of whether to issue a declaratory order is within an agency’s discretion. Tenn. Code Ann. § 4-5-223(a)(2) (1998). Upon an agency’s refusal to issue a requested declaratory order, an affected person may file a lawsuit in the Chancery Court of Davidson County. Tenn. Code Ann. § 4-5-225 (1998).

As noted above, the Authority based its decision not to issue a declaratory order as to the applicability of sections 65-5-208 and 6-5-209 on the fact that the Consumer Advocate sought a ruling on issues that had been addressed by the Authority in a previously contested case, *United Telephone-Southeast*. Under these circumstances, we cannot conclude that the Authority abused its discretion in refusing to issue the requested declaratory relief.

The Consumer Advocate also sought a declaratory order as to the applicability of the 1995 proposed settlement agreement between the parties. The Authority’s refusal to grant declaratory relief as to the applicability of the proposed settlement stems largely from its determination that the proposed agreement was not binding on either party. The Authority found that the proposed agreement was contingent upon its approval by the Commission, approval which was never granted. The proposed agreement expressly contemplated acceptance by the Commission, and acknowledged that the Commission had the authority to “approve or disprove tariffs, rates, and related issues.”

Moreover, the classification of services in the 1995 Tennessee Telecommunications Act supersedes classifications in any prior agreements or tariffs. In addition, the proposed agreement did not survive the dismissal of the 1994 tariff docket. *See Sandstrom v. Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990); *Frank Rudy Heirs Assoc. v. Sholodge*, 967 S.W.2d 810 (Tenn. Ct. App. 1997). The Consumer Advocate argues that the May 30th letter shows that BellSouth contemplated the sunset of the Commission and indicates that BellSouth would negotiate regarding future filings. Regardless, the proposed agreement was expressly contingent on the approval of the Commission. Consequently, we find no error in the Authority's dismissal of the Consumer Advocate's breach of contract claim for failure to state a claim, and we find no abuse of discretion in its decision not to issue declaratory relief as to the applicability of the proposed agreement on the 1999 tariff.

Finally, the Consumer Advocate argues that the Authority erred in refusing to convene a contested case. The Authority has the discretion to decide whether to convene a contested case to consider complaints filed with the agency. *See Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn. 1998). The Authority's decision in this case was based on its finding that the issues presented by the Consumer Advocate in its petition had been previously decided by the Authority, and that the Consumer Advocate's breach of claim contract failed to state a claim because the proposed agreement was based on a contingency that never occurred. Under these circumstances, we find no abuse of discretion in the Authority's decision.

In sum, we affirm the Authority's decision to refuse to issue the requested declaratory relief, the dismissal of the breach of contract claim for failure to state a claim, and the decision to decline to convene a contested case. All other issues raised in this appeal are pretermitted.

The decision of the Tennessee Regulatory Authority is affirmed. Costs are taxed to the appellant, the Consumer Advocate Division and its surety, for which execution may issue if necessary.

HOLLY K. LILLARD, JUDGE